



STATE OF NEW JERSEY

In the Matter of Keith Lefferts,
Police Captain (PM0886S), Township
of Parsippany-Troy Hills

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2018-454

Bypass Appeal

ISSUED: APRIL 6, 2018 (JET)

Keith Lefferts, represented by Nicholas J. Palma, Esq., appeals the bypass of his name on the Police Captain (PM0886S), Parsippany-Troy Hills, eligible list.

The appellant took the promotional examination for Police Captain (PM0886S), achieved a passing score, and was ranked on the subsequent eligible list. The appellant’s name was certified on July 5, 2017 (PL170824).¹ In disposing of the certification, the appointing authority bypassed the appellant, who was the number one ranked eligible on the certification, and recorded him as “retained, interested others appointed.” The appointing authority appointed Brian Dowd, who was the second ranked eligible on the certification, effective July 24, 2017. It is noted that the PM0886S list was certified six times and two appointments were made.

On appeal to the Civil Service Commission (Commission), the appellant asserts that he was inappropriately bypassed as he ranked higher than Dowd on the list. Further, the appellant contends that his bypass was retaliatory as he was removed from his provisional appointment as Police Captain.² The appellant adds

¹ It is noted that the PM0886S eligible list was incomplete as it only contained the appellant’s and Dowd’s names. Therefore, the PM0886S and subsequent Police Captain (PM13524) eligible list were consolidated in accordane with *N.J.A.C. 4A:4-3.5*.

² However, agency records do not reflect that the appellant served as a provisional Police Captain. The appellant states that he served as provisional Police Captain from June 2017 through July 2017. The appellant contends that he was provisionally appointed after Robert Carney was removed from

that it cannot be presumed that Dowd was appropriately appointed since the appointing authority did not provide him with a written reason for the bypass. Further, the appellant argues that he is slightly more qualified than Dowd, as he possesses a Master's degree and 28 years of law enforcement experience, while Dowd only possesses a Bachelor's degree and 24 years of law enforcement experience. The appellant adds that he and Dowd possess the same amount of commendations and training, and Dowd's service as a School Resource Officer does not establish that he was more qualified for the appointment. Moreover, the appellant asserts that, although the appointing authority promoted from an incomplete list in 2013, it did not do so in 2017. As such, Lefferts requests a retroactive appointment to Police Captain effective July 24, 2017.

In response, the appointing authority, represented by Stephen E. Trimboli, Esq., maintains that Dowd was properly appointed in accordance with the Rule of Three. The appointing authority states that, pursuant to *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City 207 N.J. 38 (2011)*, it need only provide a statement of legitimate reasons to show that the appellant's bypass was proper. In this regard, the appointing authority provides a certification from its Personnel Director, Henry Sunyak, who states that Dowd was considered the best candidate for appointment, as he demonstrated superior leadership and command qualities and also served as a School Resource Officer. In addition, the appointing authority explains that, since Dowd's and the appellant's names appeared on an incomplete promotional list (PM0886S), a new examination for Police Captain (PM1352U)³ was announced. The appointing authority adds that the appellant and Dowd took the PM1352U examination, and Dowd scored higher than the appellant by a wide margin. As such, the appointing authority maintains that Dowd was appointed for legitimate merit based reasons. Moreover, the appointing authority asserts that the appellant has not provided any evidence in support of his claim that the bypass was retaliatory in nature.

In response, the appellant asserts that, with respect to promotional opportunities, the appointing authority has demonstrated a pattern of failing to comply with this agency's rules. The appellant contends that the PM1352U examination is a "red herring" put forth by the appointing authority in order to mask the true reason for the bypass, as the appointing authority waited for Dowd to become eligible before requesting a new promotional examination for Police Captain.⁴ The appellant adds that the PM0886S eligible list is scheduled to expire in March 2018 and the current Police Chief is expected to retire. As such, the

his provisional position. See *In the Matter of Robert Carney, Police Captain (PM0886S), Township of Parsippany-Troy Hills* (CSC, decided March 22, 2017).

³ It is noted that the Police Captain (PM1352U), Parsippany examination was generated due to Thomas Carney's provisional appointment as Police Captain effective April 11, 2014.

⁴ The appellant states that the appointing authority waited approximately one and one-half years to request a new promotional examination.

appellant requests that the appointing authority be prohibited from making any appointments to the title of Police Captain until the appeal of the instant matter is decided.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii (known as the Rule of Three) allow an appointing authority to select any of the top three interested eligibles from a promotional list, provided that a veteran does not head the list. As long as that discretion is properly utilized, an appointing authority's discretion will not be overturned. *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper.

In cases of this nature where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. See *Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, *supra* at 436, 445, the Court outlined the burden of proof necessary to establish discriminatory and retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish retaliation by a preponderance of the evidence. Once a *prima facie* case showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-retaliatory reason for the decision. For the reasons set forth below, the appellant has not presented a *prima facie* case in this matter.

In this matter, the appellant has provided no substantial evidence to show that the bypass was improper. Initially, the appellant has not provided any information to show that he is more qualified than Dowd. Rather, he essentially states that he and Dowd are similarly qualified. As such, he has not established in any way that he is more qualified than Dowd to be appointed as Police Captain. The appellant's mere possession of advanced education credentials is insufficient to show that the appointing authority's selection discretion was abused without showing a direct nexus between the credentials and the position in question. It is within an appointing authority's discretion to choose its selection method, and the record indicates that the candidates were ranked and the appointing authority then selected the candidate it determined was best suited for the position. Additionally, the appointing authority provided a legitimate basis for not selecting the appellant, including that Dowd demonstrated superior leadership skills and served as a School Resource Officer. Although the appellant ranked higher on the PM0886S eligible list based on his examination score, that fact, by itself, is insufficient to establish that his bypass was improper given the discretion afforded an appointing authority under the Rule of Three. Additionally, the appointing authority's action of

appointing Dowd from an incomplete list does not establish that the appellant was improperly bypassed. The appellant's argument that the PM1352U Police Captain examination was a red herring is not persuasive, as it was generated due to Thomas Carney's provisional appointment to Police Captain. Moreover, the appointing authority was authorized to request a new examination for Police Captain in the face of an incomplete list.

With respect to the appellant's argument that he was retaliated against at the time the appointing authority removed him from the provisional appointment, the appellant has not provided any substantive evidence in support of that claim. Even assuming, *arguendo*, that the appellant actually served as a provisional Police Captain, the Commission does not agree that the appellant's return to his permanent title is a *prima facie* showing of retaliation. The appellant's removal from the provisional appointment, in and of itself, does not establish that he was subjected to retaliation. As noted in *Carney, supra*, a provisional appointment does not automatically entitle an employee to a permanent appointment. Additionally, it was at the appointing authority's discretion to remove the appellant from his provisional appointment. Moreover, the appointing authority likely would not have provisionally appointed the appellant if he had been subjected to retaliation.

One final matter warrants comment. Since the appellant's appeal has been decided for the reasons noted above, it is unnecessary to address his request to prohibit the appointing authority from making additional appointments to the title of Police Captain.

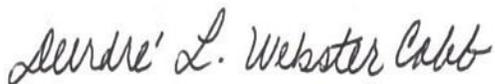
Accordingly, the appellant has not sustained his burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4th DAY OF APRIL, 2018



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